Filed 9/26/17 P. v. Holtzclaw CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BILLY JOE HOLTZCLAW,

Defendant and Appellant.

F072186

(Super. Ct. Nos. CRF39561; CRF38014)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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In March 2012, appellant Billy Joe Holtzclaw committed felony petty theft with prior convictions and threatened a witness. In August 2012, while out on bail on the petty theft and related charges, he failed to appear in court, which constituted another

felony pursuant to Penal Code[1] section 1320.5. Subsequently, the underlying petty theft offense was reduced to a misdemeanor pursuant to the Safe Neighborhoods and Schools Act (hereafter Proposition 47). On appeal, Holtzclaw contends the trial court erred in refusing to reduce his failure to appear charge to a misdemeanor in light of the reduction of the underlying offense; that the trial court erred when it imposed the aggravated term on the failure to appear charge; and that the jail sentence for misdemeanor petty theft with a prior should be no more than six months and not one year. We agree only with his last contention and in all other respects affirm.

PROCEDURAL HISTORY[2]

On May 31, 2012, an amended information in case No. CRF38014 (case No. 1) charged Holtzclaw with count 1, petty theft with prior convictions (§§ 484/666) and count 2, threatening a witness (§ 140, subd. (a)). It was further alleged as to count 1 that Holtzclaw had been convicted and served a prison term for six different enumerated felony convictions; as to count 2, one prior strike was alleged (§ 667, subds. (b)-(i)), as well as four prior prison terms (§ 667.5, subd. (b)); and as to both counts 1 and 2, nine different prior felony convictions were enumerated for purposes of probation ineligibility (§ 1203, subd. (e)(4)).

On August 6, 2012, Holtzclaw failed to appear and a no-bail bench warrant issued. He was returned to the jurisdiction of the court a year later on August 1, 2013.

On August 7, 2013, a felony complaint in case No. CRF39561 (case No. 2) charged Holtzclaw with count 1, failing to appear while on bail (§ 1320.5) in case No. 1. It further alleged the offense was committed while Holtzclaw was released on bail

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 We omit recitation of the underlying facts, as they are immaterial to the issues raised on appeal.

(§ 12022.1), and that Holtzclaw suffered one prior strike conviction (§ 667, subds. (b)-(i)).

On November 12, 2013, Holtzclaw entered into a settlement in which he pled guilty in case No. 1, count 1, and admitted the prior strike. In case No. 2, he pled guilty to count 1, and admitted the prior strike. On the People's motion, the trial court dismissed the remaining allegations.

On January 21, 2014, Holtzclaw was sentenced to an aggregate term of seven years, four months, consisting of, in case No. 1, the upper term of three years, doubled due to the strike and, in case No. 2, eight months, doubled due to the strike.

On January 5, 2015, Holtzclaw filed a section 1170.18 petition in case No. 1, seeking to resentence his section 666 conviction as a misdemeanor. On January 12, 2015, Holtzclaw filed a section 1170.18 petition in case No. 2 seeking to also resentence his section 1320.5 conviction as a misdemeanor.

On July 7, 2015, the trial court granted the petition in case No. 1, reduced the offense to a misdemeanor and also struck the attached strike allegation. That same day, the trial court denied the petition in case No. 2, finding, inter alia, that the offense of section 1320.5 was ineligible for relief under Proposition 47.

Holtzclaw was resentenced as follows: in case No. 1, to one year in jail for the misdemeanor petty theft; and in case No. 2, to the aggravated term of three years in state prison, doubled due to the prior strike, for an aggregate sentence of six years.

DISCUSSION

I. REDUCTION OF FAILURE TO APPEAR CHARGE

As he did below, Holtzclaw contends the trial court should have reduced his failure to appear conviction to a misdemeanor once the underlying offense of petty theft with priors was reduced pursuant to Proposition 47.[3] We disagree.

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[3] This issue is currently pending in the California Supreme Court. (See *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046; *People v.*

Proposition 47, effective November 5, 2014, reclassified certain felony drug and theft related offenses as misdemeanors, including petty theft with a prior conviction as charged here in count 1, case No. 1. (Prop. 47, as approved by voters, Gen. Elec. (Nov 4, 2014), eff. Nov. 5, 2014; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) … [¶] Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§ 1170.18, subd. (f); see *id.*, subds. (g)-(h).)" (*Rivera, supra,* at pp. 1092-1093.) In addition, subdivision (k) of section 1170.18 provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes," with exceptions not applicable here.

Focusing on the language of section 1170.18, subdivision (k) that a felony reduced to a misdemeanor under that section "shall be considered a misdemeanor for all purposes," Holtzclaw contends the reduction of his petty theft offense must be given collateral retroactive effect to his failure to appear charge. We disagree.

Section 1320.5 provides that "[e]very person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." The gravamen of a violation of section 1320.5 is "the defendant's act of jumping bail and

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Buycks (2015) 241 Cal.App.4th 519, review granted Jan. 20, 2016, S231765; see also *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305.)

consequent evasion of the court's process," not the nature of the crime for which he is ultimately convicted. (*People v. Walker* (2002) 29 Cal.4th 577, 585 (*Walker*); *People v. Jenkins* (1983) 146 Cal.App.3d 22, 28 [failure to appear is premised on a defendant's breach of a "contractual agreement"].) As such, a defendant may be convicted of violating section 1320 even if he or she is not ultimately convicted of "the charge for which he or she was out on bail when failing to appear in court as ordered." (*Walker, supra,* at p. 583; see also *People v. Abdallah* (2016) 246 Cal.App.4th 736, 748 [noting that the language of section 1320.5 "makes clear that whether a defendant's felony conviction is ultimately downgraded under Proposition 47 does not affect the applicability" of a felony failure to appear offense].) Because Holtzclaw was charged with a felony petty theft with a prior at the time of his failure to appear, it is immaterial whether he was ultimately convicted of the underlying felony offense.

We find no error on the part of the trial court in denying his petition to reduce his failure to appear conviction to a misdemeanor.

II. RESENTENCING

Holtzclaw next contends the trial court's subsequent choice of the aggravated term of three years for the failure to appear charge constituted "impermissible reliance on an agreement rendered moot by Proposition 47." (Some capitalization omitted.) We find no error.

Procedural Background

On January 21, 2014, Holtzclaw was sentenced, pursuant to a plea agreement, to an aggregate term of seven years, four months, consisting of the upper term of three years, doubled due to the strike in case No. 1 and eight months, the midterm, doubled due to the strike in case No. 2.

At the July 7, 2015, resentencing after Holtzclaw's petty theft felony in case No. 1 was reduced to a misdemeanor, the trial court sentenced Holtzclaw to the aggravated term of three years for the failure to appear offense, doubled pursuant to the strike alleged in

case No. 2. In finding the aggravated term, the trial court found Holtzclaw's prior criminal history extensive, and also noted "the People and defense agreed that he would get an aggravated term" in case No. 1.

Applicable Law and Analysis

Holtzclaw is arguing, in essence, that the reduction of the petty theft with a prior conviction renders the prior plea bargain previously agreed upon "moot," and the trial court is without authority to sentence him to the aggravated term condition which was part of the original plea agreement. We find no error on the part of the trial court.

Recent cases have held that, "where a petition under section 1170.18 results in reduction of the conviction underlying the principal term from a felony to a misdemeanor, the trial court must select a new principal term and calculate a new aggregate term of imprisonment, and in doing so it may reconsider its sentencing choices." (*People v. Roach* (2016) 247 Cal.App.4th 178, 185.)

We reject Holtzclaw's contention that the trial court somehow believed it was required to impose the aggravated term required by the plea agreement. Although the trial court's comments during resentencing stated that the People and defense had agreed on the aggravated term in case No. 1, the trial court also went into great detail to note Holtzclaw's extensive prior criminal history as a current factor in aggravation.

By reducing Holtzclaw's felony petty theft with a prior offense to a misdemeanor and resentencing him on that count, the plea agreement incorporated the change in the law under Proposition 47. (*Doe v. Harris* (2013) 57 Cal.4th 64, 71 ["[T]he general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy"].) This does not mean, however, that the court could not choose to increase the sentence on the failure to appear charge so long as the overall sentence did not run afoul of section 1170.18's prohibition against imposing an overall greater

sentence than before. (§ 1170.18, subd. (e).) Holtzclaw was resentenced to a lesser term and, as such, we find no error on the part of the trial court.

III. SENTENCING ON THE MISDEMEANOR PETTY THEFT WITH A PRIOR

When the trial court granted Holtzclaw's section 1170.18 petition and reduced his petty theft with a prior conviction to a misdemeanor, it sentenced him to serve a one year jail term, to be served concurrently to the sentence pronounced in case No. 2. Holtzclaw contends this matter must be remanded so the trial court may impose an appropriate sentence, not to exceed six months. Respondent agrees with Holtzclaw that the sentence was unauthorized, but asks that this court reduce the sentence to six months. We find Holtzclaw's request appropriate and remand for resentencing.

One of the nonserious crimes affected by Proposition 47 is petty theft with a prior under former section 666. "For most persons, the crime of petty theft with a prior, for which the punishment is imprisonment in the county jail not exceeding one year or in the state prison, is eliminated. As amended by the initiative, section 666 applies only if: (1) the person is convicted of petty theft in the current case; (2) has served a term of imprisonment for a prior conviction of 'petty theft, grand theft, a conviction pursuant to subdivision (d) or (e) of Section 368 [(elder abuse)], auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496'; and (3) 'is required to register pursuant to the Sex Offender Registration Act, or … has a prior violent or serious felony conviction, as specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667, or has a conviction pursuant to subdivision (d) or (e) of Section 368.' (§ 666, subds. (a), (b).)" (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1330, fn. omitted.)

Holtzclaw has none of the specifically described "aggravating conditions" enumerated in the statute. Thus, while Holtzclaw was sentenced to the three-year upper term under the version of section 666 in effect at the time he entered his no contest plea, under the amended version of the statute, he would not be subject to punishment for the

crime of petty theft with a prior conviction. Instead, under the current statutory definitions, Holtzclaw's petty theft conviction is now a misdemeanor "punishable by fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or both." (§ 490.) Accordingly, the matter is remanded to the trial court to impose an appropriate sentence for the petty theft offense in case No. 1, not to exceed six months.

DISPOSITION

The case is remanded to the trial court for resentencing of Holtzclaw's misdemeanor petty theft conviction, not to exceed six months. In all other respects, the judgment is affirmed.

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FRANSON, Acting P.J.

WE CONCUR:

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PEÑA, J.

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BLACK, J.*

* Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.